



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

IN THE MATTER OF CLAIM AGAINST THE
DEALER BOND OF JAMES LETIZIA d/b/a
DIAMOND JIM'S AUTO SALES

Case No. TR-00-0044

FINAL DECISION

Mr. Alfred Poston filed a claim on or about September 7, 2000, with the Wisconsin Department of Transportation (the "Department") against the motor vehicle dealer bond of James Letizia, d/b/a Diamond Jim's Auto Sales, (the "Dealer"). The claim, along with the documents gathered by the Department in its investigation, was referred to the Division of Hearings and Appeals for hearing. The undersigned gave the parties until December 22, 2000, to file any additional information they wished to have considered in issuing a preliminary determination in the matter. The Dealer submitted a letter dated December 22, 2000. Mr. Poston telephoned the undersigned on December 28, 2000, and the undersigned requested that he write a letter immediately if he wished to have additional information considered. On January 5, 2000, the undersigned received a letter from Ms. Terry Poston, who is Mr. Poston's spouse, regarding the matter, and which in part responds to assertions set forth in the Dealer's letter dated December 22, 2000.

On January 17, 2001, the undersigned issued a Preliminary Determination and informed the parties that if no timely objection to the Preliminary Determination were received by February 16, 2001, that the Preliminary Determination would be subject to adoption as the Final Decision in the matter. The Dealer filed an objection to the Preliminary Determination on February 16, 2001. The undersigned then scheduled a hearing on the matter for March 21, 2001, in Milwaukee. On March 20, 2001, the Dealer submitted a written notice that the Dealer was withdrawing the objection to the Preliminary Determination and was remitting a check in the amount of \$225 to Mr. Poston. The undersigned accordingly cancelled the scheduled hearing and adopts the Preliminary Determination as the final decision of the Department of Transportation pursuant to Wis. Adm. Code § Trans 140.26(5)(d).

The parties to this proceeding are certified as follows:

Mr. Alfred Poston
2438 W. Medford Avenue
Milwaukee, WI 53206

Mr. James Letizia
d/b/a Diamond Jim's
5848 South 27th Street
Milwaukee, WI 53221

Capitol Indemnity Corporation
P.O. Box 5900
Madison, WI 53705-0900

FINDINGS OF FACT

1. Mr. James Letizia, d/b/a Diamond Jim's (the "Dealer") is a motor vehicle dealer licensed by the Department pursuant to Wis. Stat. § 218.01 (1997-1998). The Dealer's facilities are located at 5848 S. 27th Street in Milwaukee, Wisconsin.
2. The Dealer has had a surety bond in place from November 30, 1992 to the present. Bond number LP 569364A from Capitol Indemnity Insurance Company was in effect from November 30, 1998 to November 30, 2000.
3. On June 13, 2000, Mr. Alfred Poston purchased a 1992 Cadillac Deville, VIN AG6CD53B6N4233587 (the Vehicle) from the Dealer for purchase price of \$7,995.00 plus tax. The Dealer had acquired the Vehicle about 10 days earlier, on or about June 2, 2000.
4. In connection with the sale, the Dealer also sold an after-market theft deterrent system called "Starguard Alarm", at a cost of \$395.00. The contract of sale reflected this amount as the cost for the alarm system, in addition to the purchase price of the Vehicle.
5. The Vehicle already had a "Personal Automotive Security System" (known as the "PASS KEY" system) as standard equipment. The "Starguard Alarm" system that Mr. Poston purchased would operate completely separately from the PASS KEY system and would provide enhanced theft deterrence over the PASS KEY standard equipment. The Starguard Alarm system was never installed because soon after the sale Mr. Poston sought to rescind the purchase of the Starguard System. The Dealer refused to do so, but did agree to "refund" \$100 of the price. Mr. Poston accepted the \$100 payment.
6. The Wisconsin Buyers Guide showed that the Dealer inspected the Vehicle for purposes of completing the Buyers Guide on June 13, 2000, the same day as the sale. The Buyers Guide indicated in the "Used Vehicle General Condition" section that the Vehicle was free of significant existing defects and damage, including having no "Known or visible leaks, excluding minor seepage".
7. When Mr. Poston signed the contract of sale on June 13, 2000, the right rear reflector was intact. The next day, when Mr. Poston came to accept delivery of the Vehicle, he observed that this reflector was cracked. Mr. Poston accepted delivery of the Vehicle despite being aware of this cracked reflector.
8. On or about June 19, 2000, Mr. Poston had the Vehicle inspected by a mechanic at Wisconsin Muffler. The mechanic provided an estimate for repairs for leaks totaling

\$1350.40 plus tax. The items that would be repaired or replaced included "rack and pinion", power steering "hose" and "cooler", front and rear shock absorbers, and the oil pan gasket.

9. On or about June 20, 2000, Mr. Poston had the Vehicle inspected by a second mechanic, who was employed at Crest Cadillac. Documentation of the inspection indicated that power steering fluid was leaking from the "strg gear" and that work was indicated for the "by pass power strg cooler". The documentation also provided an estimate for work on "engine oil pan & gasket & bolts", "frt cover gasket & fit crankshaft seal", "right rear strut", and a four-wheel alignment.
10. On or about June 22, 2000, Mr. Poston filed a complaint with the Department of Transportation Dealer Section ("Dealer Section") seeking \$300 for the balance for the Starguard Alarm, and "half of \$1,300 for my repairs". He alleged that he signed the contract of sale that included the additional cost for the alarm system because he "was under pressure [because] of my diabetes and high blood pressure" and "wasn't at my normal thinking". He alleged that he should be compensated for half of the repairs because some of the items that had been identified by Wisconsin Muffler as requiring repairs should have been disclosed on the Wisconsin Buyers Guide but were not.
11. On June 26, 2000, Mr. Poston had the "power steering cooler" repaired or replaced by Wisconsin Muffler at a cost of \$225.00 plus tax.
12. On July 18, 2000, Mr. Poston had the front and rear shock absorbers replaced by Wisconsin Muffler at a cost of \$401.07.
13. Investigator Jim Anderson of the Dealer Section investigated Mr. Poston's formal complaint. As part of that investigation, the Vehicle was inspected at Crest Cadillac on July 26, 2000, by the same mechanic who had inspected the Vehicle on June 20, 2000, with Mr. Poston and two investigators from the Dealer Section present. This inspection revealed, among other things, the following:
 - a) Only minor oil seepage was detected around the engine, oil pan, gasket, and bolts.
 - b) There was no leakage from the power steering cooler, which had been replaced on June 26, 2000. The recollection of the Crest mechanic suggested to one of the Dealer Section investigators that there might have been "a substantial leakage problem in this area when it was first inspected" on June 20, 2000.
 - c) There was no leakage from the steering gear (rack and pinion), although there had been moisture detected there on June 20, 2000, before the power steering cooler had been replaced, thus suggesting to the investigators that the moisture had been from the leakage from the power steering cooler.
14. By letter dated August 8, 2000 from the Dealer Section to Mr. Poston, the Dealer Section advised Mr. Poston that with respect to the complaint regarding repairs that "the Department has found that there may have been disclosure violations sufficient enough for the dealership to take responsibility for." The Dealer Section invited Mr. Poston to file a bond claim with respect to the repairs.

15. On August 9, 2000, the Dealer (Mr. Letizia) contacted an official in the offices of the Dealer Section in Madison to register concerns regarding the handling and investigation of Mr. Poston's complaint. Later the same day, an official in the Madison office of the Dealer Section then contacted the lead investigator (Investigator Anderson). According to the investigation report, Investigator Anderson was "informed of the lack of proof involved with the complaint and that a bond claim was inappropriate in this situation." Minutes later a conference call was convened with Mr. Letizia, Investigator Anderson, and the official in Madison, in which the Dealer was informed that the Dealer Section "would not be allowing the bond claim to go through."
16. On August 10, 2000, Investigator Anderson telephoned Mr. Poston to inform him that his complaint had been reviewed and that "it would not be eligible for a bond claim." Mr. Poston was dismayed about the Dealer Section's sudden reversal of positions.
17. By letter dated August 10, 2000 from Investigator Anderson to Mr. Poston, Investigator Anderson formally retracted his letter of August 8. The August 10 letter stated that upon further review the Dealer Section had "determined that there is not enough evidence to support a definitive violation in the disclosure of the vehicle at that time of sale". The Dealer Section informed Mr. Poston that it would be closing the file at this time.
18. Mr. Poston then filed on bond claim on or about September 7, 2000, in which he sought the damages totaling \$1,346.07, for the following:
 - a) Power steering cooler leak \$225.00
 - b) Oil pan leak \$220.00
 - c) Bumper reflector crack \$100.00
 - d) Right rear shock leak \$401.07
 - e) Starguard Alarm \$400.00
19. Mr. Poston's bond claim was filed within three years of the ending date of the period the Capitol Indemnity bond was in effect and thus the claim is timely.
20. The leak from the power steering cooler existed at the time of the Dealer's inspection on June 13, 2000, and was more than minor seepage. The Dealer, in the exercise of reasonable care, should have discovered this leak as part of its used vehicle inspection. The leak was not disclosed on the Wisconsin Buyers Guide.
21. The presence of oil around the engine with mileage of over 100,000 miles constituted "minor seepage" and was not required to be specifically disclosed on the Wisconsin Buyers Guide.
22. The bumper reflector was not cracked at the time of the vehicle inspection and thus could not have been disclosed on the Wisconsin Buyers Guide.
23. There is insufficient evidence to show either (a) that a significant defect or damage to the right rear shock absorber existed at the time of the Dealer's inspection on June 13, 2000, or (b) that even if any such defect or damage did exist, that the Vehicle was thus unsuitable for legal operation on the state's highways under Wis. Adm. Code Chapter Trans 305. There is thus insufficient evidence that information regarding the right rear shock absorber should have been disclosed on the Wisconsin Buyers Guide.

24. There is no evidence showing that the sale of the Starguard Alarm system was caused by any act of the Dealer that would be grounds for the suspension or revocation of the Dealer's motor vehicle dealer license.
25. The repair for the leaking power steering cooler at a cost of \$225.00 was caused by an act of the Dealer that would be grounds for the suspension or revocation of its motor vehicle dealer license. Accordingly, this part of the claim is allowable.
26. None of the other damages claimed were caused an act of the Dealer that would be grounds for the suspension or revocation of its motor vehicle dealer license, and thus those portions of the claim are not allowable.

DISCUSSION

The procedure for determining claims against dealer bonds is set forth in the Wisconsin Administrative Code at Chapter Trans 140, Subchapter II. Section Trans 140.21(1) provides in relevant part as follows:

A claim is an allowable claim if it satisfies each of the following requirements and is not excluded by sub. (2) or (3):

(a) The claim shall be for monetary damages in the amount of an actual loss suffered by the claimant.

(b) The claim arose during the period covered by the security.

(c) The claimant's loss shall be caused by an act of the licensee, or the [licensee's] agents or employees, which is grounds for suspension or revocation of any of the following:

1. A salesperson license or a motor vehicle dealer license, in the case of a secured salesperson or motor vehicle dealer, pursuant to s. 218.01(3)(a)1. to 14., 18. to 21., 25. or 27. to 31., Stats.

* * * *

(d) The claim must be made within 3 years of the last day of the period covered by the security. The department shall not approve or accept any surety bond or letter of credit which provides for a lesser period of protection.

Accordingly, to allow a claim, a finding must be made that the Dealer violated one of the sections of § 218.01(3)(c), Stats., listed in Wis. Adm. Code § Trans 140.21(1)(c)1, and that the violation caused the loss claimed.

The Wisconsin Buyers Guide indicated that there were no "Known or visible leaks, excluding minor seepage". Two independent vehicle inspections, occurring only about week after the Dealer's inspection, revealed the presence of the leak on the power steering cooler, which Mr. Poston caused to be repaired soon thereafter. I find that a preponderance of the evidence shows that this leak existed at the time of the Dealer's inspection on June 13, 2000, and that the Dealer in the exercise of reasonable care should have discovered it at that time. Under

Wis. Adm. Code §§ Trans 139.04(4), the Dealer has the duty to disclose in the Buyers Guide "significant existing mechanical ... defects and damage" that the Dealer "can find using reasonable care." Section Trans 139.04(4) provides as follows:

(4) USED MOTOR VEHICLE GENERAL CONDITION DISCLOSURE. Dealer and salespersons shall inform prospective retail purchasers of used motor vehicles in writing before purchase contract execution, in the manner and on the form prescribed in sub. (6). This disclosure shall include all significant existing mechanical, electrical and electronic defects and damage and evidence of repair to strut tower, trunk floor plan, frame or structural portion of unibody, including corrective welds. Disclosure of information shall be that which the licensee can find using reasonable care.

There is insufficient evidence showing that the leak of the oil pan was more than minor seepage at the time of the Dealer's inspection. The inspection of the Vehicle done about six weeks after the sale showed only minor seepage around the engine, oil pan, gasket, and bolts. Such minor seepage on an eight-year old engine with over 100,000 miles does not constitute "significant mechanical defect" that requires disclosure on the Wisconsin Buyers Guide. Indeed, the form for the Buyers Guide prescribed by the Department expressly excludes "minor seepage" from disclosure.

There is insufficient evidence to show that the condition of the right rear shock absorber was defective at the time of the Dealer's inspection on June 13, 2000, or that if defective or damaged the Vehicle could not be legally operated on the state's highways under Wis. Adm. Code Chapter Trans 305. Thus, there is insufficient evidence that this should have been disclosed on the Wisconsin Buyers Guide.

There is no evidence that the rear bumper reflector was cracked at the time of the Dealer's inspection on June 13, 2000. Rather, the only evidence is that the reflector became cracked between the time the contract of sale was entered into and the time that Mr. Poston accepted delivery the next day. Mr. Poston chose to accept delivery of the Vehicle despite being aware of the presence of the cracked reflector. There is no evidence that Mr. Poston suffered a loss caused by an act of the Dealer that would be grounds for suspension or revocation of the Dealer's license.

There is no evidence showing that the sale of the Starguard Alarm system was in violation of any act of the Dealer that would be grounds for the suspension or revocation of the Dealer's motor vehicle dealer license. The sale of this system was accomplished in an "arms length transaction" between the Dealer and Mr. Poston, each acting in their own self interest. Claims under a dealer bond are extremely limited in their scope. There is no evidence that the Dealer's sale of the Starguard Alarm violated any provision that would support a claim under a dealer bond under Wis. Adm. Code § Trans 140.21(1). The absence of available relief under a dealer bond, would not preclude Mr. Poston from seeking such relief in a civil action at law or equity, if he deemed such a lawsuit appropriate.

CONCLUSIONS OF LAW

1. Alfred Poston's claim arose on July 13, 2000, the date he purchased the Vehicle from the Dealer. The surety bond issued to Dealer by Capitol Indemnity Corporation was in effect at this time. The claim arose during the period covered by the surety bond.

2. Mr. Poston filed a claim against the motor vehicle dealer bond of the Dealer on or about September 7, 2000. The bond claim was filed within three years of the last day of the period covered by the surety bond. The claim is timely filed pursuant to Wis. Adm. Code § Trans 140.21(1)(d).

3. Mr. Poston suffered a loss of \$225.00 that was caused an act of the Dealer that would be grounds for the suspension or revocation of its motor vehicle dealer license, representing the cost of repair/replacement of the power steering cooler. This part of the claim is allowable under Wis. Adm. Code § Trans 140.21(1)(c).

4. The remaining elements of Mr. Poston's claim were not caused by an act of the Dealer that would be grounds for the suspension or revocation of the Dealer's license. Therefore, the remaining parts of the claim are not allowable under Wis. Adm. Code § Trans 140.21(1)(c),

5. The Division of Hearings and Appeals has authority to issue the following order.

ORDER

The claim filed by Mr. Alfred Poston against the motor vehicle dealer bond of James Letizia, d/b/a/ Diamond Jim's Auto Sales is ALLOWED to the extent of \$225.00. All other aspects of the claim are DENIED.

Dated at Milwaukee, Wisconsin on March 22, 2001.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
819 N. 6th Street, Room 92
Milwaukee, Wisconsin 53203-1685
Telephone: (414) 227-1860
FAX: (414) 227-3818

By: _____
William S. Coleman, Jr.
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of secs. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.